United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1210

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA, :

Appellee, :

v. :

AL TAYLOR, WILLIAM TURNER, CHARLES RAMSEY, RUFUS WESLEY, HENRY SALLEY and AL GREEN, :

Appellants. :

- X

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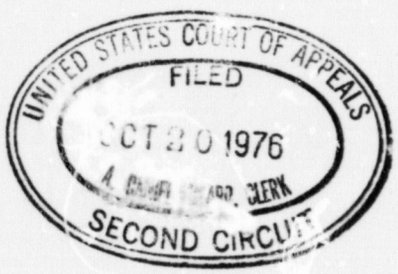
On appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF OF APPELLANT WESLEY



ELEANOR JACKSON PIEL
Attorney for Appellant
Rufus Wesley
36 West 44th Street
New York, N. Y. 10036
(212) MU 2-8288

Printinghouse Press – Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

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REPLY BRIEF OF APPELLANT WESLEY

The government has failed to meet the thrust of the points urged by defendant Wesley which mandate the reversal of his conviction of one count of conspiracy to violate the federal narcotics law and one substantive count of sale and distribution of narcotics.

In opening its gargantuan brief, the government preliminarily sets forth a fact statement with no record attribution. The fact statement, itself, is reminiscent of the Tramunti case [United States v. Tramunti, 513 F.2d 1087 (2 Cir. 1975)] but contains many assertions about which, although there may have been such evidence in the Tramunti case, there was no evidence below, viz.:

> "The appellants herein, and their co-defendants, are best characterized as wholesalers of the

> heroin sold by that part of the Tramunti organization headed by Joseph DiNapoli. Joseph DiNapoli was in partnership with Francis X. Pugliese who was the original source of narcotics wholesaled by Warren Robinson and the conspirators charged in this case."* (Govt. Br. pp. 5, 6)

> "Other defendants -- Henry Salley, Rufus Wesley, Cecil Tate, James March -- assisted Robinson in transporting, storing, diluting and delivering heroin in Washington. They performed these roles at various times, but always in a cooperative, rather than competitive, way. Another defendant, Walter John Smith, supplied lactose regularly to the organization in exchange for narcotics and cash."** (Govt. Br. p. 6)

The record is barren of any connection of Wesley to anyone except Robinson and Dawson in connection with any conspiracy and, in fact, much of defendant Wesley's brief is concerned with the absence of evidence of his connection to the other alleged conspirators (Wesley Br. pp. 4-9, 17-23).

> "In sum, the conspiracy revolved around a core group of Pugliese, DiGregorio, Pannirello and Dilacio." (Govt. Br. p. 7)

There was no evidence of a "core group". Pannirello testified as to various dealings with various defendants, including Wesley, but did not assert as a fact any over-all conspiracy embracing

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* No record attribution of this fact is made nor could it be made -- there was no such evidence.

** There was absolutely no evidence in the record concerning the underlined portions of the text. And in fact the evidence adduced by Dawson only was that Dawson, Wesley and Robinson were at odds in their narcotic dealings (TR 244, 245).

such defendants. In this connection, the government invokes Tramunti and requests this Court to attach its knowledge of the facts in that case to this case even though the Tramunti facts were not before the jury. In effect the government is invoking "spill-over" and "splash back" to the Tramunti case to support the convictions in the case at bar.

I
ANSWERING POINT II
(Govt's Br. p. 29)

The government relies on this Court's affirmance of the conviction in Tramunti, on the issue that there was only one -- not multiple conspiracies alleged and proved. In so doing, the government fails to recognize that this is a different case with different evidence and that Judge Duffy, himself, the trial judge in both cases, treated them differently. In Tramunti Judge Duffy marshalled the evidence -- a fact commented on by this Court which supported its affirmance of the Tramunti conviction. In the case at bar Judge Duffy did not marshal the evidence. In describing the scope of this claimed alleged single conspiracy, the government completely fails to even mention the defendant Wesley in connection with the "core" group, viz.:

> "In the course of the period between 1970 and 1973, the 'core group' of this conspiracy including Pugliese, Pannirello, and DiGregorio trafficked in heroin with a large group of persons both in New York and Washington. This group included Hansen, Green, Robinson and Dawson, and the latter two dealt with Taylor, Turner, and Ramsey, among others." (Footnote omitted) (Govt's Br. p. 30)

Despite the government's categorical statement that only one conspiracy was involved, the evidence was otherwise (see Wesley Br. pp. 17-23). Says the government:

> ". . . it is clear that 'the Government's evidence successfully assimilates the model of the so-called "chain conspiracy," so familiar in other narcotics cases.' United States v. Agueci, 310 F.2d 817, 826 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963). What the Court stated in Agueci is applicable here:
>
> > 'An individual associating himself with a "chain" conspiracy knows that it has a "scope" and that for its success it requires an organization wider than may be disclosed by his personal participation.'"
>
> (Govt's Br. p. 32)

The record can be combed from one end to the other of the 4000 odd pages and not one word appears connecting Wesley to knowledge, by implication or otherwise, of or to any conspiracy wider or with more persons in it than Pannirello, Dawson, Robinson and a little-mentioned co-conspirator called "Mouthpiece". Under these circumstances as a matter of fact Wesley did not and could not have had knowledge of any "chain" conspiracy involving the myriad of charged alleged conspirators. These facts, affecting, as they do, the "substantial rights of the accused" thus put a special obligation on the trial court to marshal the evidence for the jury with reference to the role each alleged co-conspirator played and the importance of a fact-finding on the issue of single or multiple conspiracy. Moreover, since there were so many days of testimony involving hearsay and

direct testimony about narcotic transactions unconnected to Wesley, his case could not help but be affected by a "spill-over" and "guilt transference" effect. Said this Court recently in United States v. Tolliver, ___F.2d ___ decided September 2, 1976:

> "The existence of such a 'spillover' or 'guilt transference' effect, as it has also been described, turns in part on whether the numbers of conspiracies and conspirators involved were too great for the jury to give each defendant the separate and individual consideration of the evidence against him to which he was entitled."

On that very issue -- the issue of numbers of alleged co-conspirators involved, nine indicted and six at trial were held insufficient to warrant the spill-over error. Tolliver and United States v. Miley, 513 F.2d 1191, 1209 (2 Cir. 1975). In United States v. Bertolotti, 529 F.2d 149, 156, 157 (2 Cir. 1975) 29 indicted and seventeen tried, on the other hand, were held too many to afford any defendant a fair trial as were 32 indicted and 19 tried in Kotteakos v. United States, 328 U.S. 750 (1946). The case at bar involved fifty-five named but unindicted co-conspirators, seventeen indicted and twelve tried for conspiracy. Moreover, the eleven other co-conspirators tried were not connected to the defendant Wesley. Thus under the established law of this Circuit, defendant's trial with eleven other was necessarily prejudicial. The record does not show that any other defendant knew Wesley so that spill-over as to Wesley was even more underlined.

This Court has recently had occasion to discuss the test for reversible error where more than one conspiracy is alleged and proved in United States v. Sir Kue Chin, 534 F.2d 1032, 1035 (2 Cir. 1976). The test as there defined "is whether the variance affects substantial rights". Here the prejudicial effect of associating Wesley in a trial with eleven other defendants, none of whom he is alleged to have known or dealt with, is patent indeed.

II
ANSWERING POINTS XIII AND XIV
(Govt's Br. pp. 74-84)

Defendant Wesley contended in his Point I (Wesley Br. pp. 10-17) that he was denied his Sixth Amendment right to trial by jury by reason of the trial court's flouting the express provisions of F.R.C.P. 24(c) in refusing upon request to grant any peremptory challenges to the four alternate jurors and by other rulings which prejudicially affected the relationship of the defendant to the jury.

Appellee contends that defense counsel waived the provisions of Rule 24(c) by failing to object when Judge Duffy announced his intention to grant sixteen challenges "across the board" and excluding any peremptory challenges to the alternate jurors. By footnote (p. 79) appellee contended that:

> ". . . whether or not Mrs. Piel was in the courtroom at the very moment that the court described its plans for the allotment of challenges, she was being provided with daily copy of the transcript (Tr 1/21/76 at 3) and she must be charged

> with knowledge of how challenges were to be exercised. Prior to the selection of the jury, she voiced no objection to the announced procedure." (Govt's Br. fn. p. 79)

This is simply not true in a number of different respects. The minutes of the pretrial proceedings and particularly those of January 21, 1976, were not written up until a special request was made for them in connection with this appeal after the jury verdict was entered. This is true although a daily transcript of trial testimony was made available to counsel. Specific objection was taken by counsel for Wesley to the denial of all peremptory challenges to him and the denial of any peremptory challenges to the alternates before the jury was sworn and, accordingly, the trial court had an opportunity to correct the error thus making clear the court's abuse of discretion and specific violation of the statutory rule.

The government has been unable to find any case which condones the express disregard of the language of F.R.C.P. Rule 24 in the face of defense counsel's objection. United States v. Projansky, 465 F.2d 123, 140-41 (2 Cir. 1972) cert. den. 409 U.S. 1006 (1972) is not controlling since it affirmed Judge Lasker's granting 16 peremptory challenges to defense counsel in a multiple defendant suit and 8 peremptory challenges to the government. There no objection was made to preserve the issues on appeal of an extra two peremptory challenges granted to the government. Similarly, no objection to the procedure of apparently infinite peremptory challenges was made in New England

Enterprises Inc. v. United States, 40[illegible] F.2d 58, 66-69 (1 Cir. 1968) cert. den. 393 U.S. 1036 (1969).

(a)

On the denial of pertinent questions on voir dire concerning educational background and children (Govt's Br. p. 80).

Despite being requested in writing and orally by counsel, Judge Duffy refused to ask questions on voir dire of the prospective jurors on the issue of their educational background, whether or not they had children and what the occupations of any children might be. Cases cited by the government in suggesting the omission was not error do not support this proposition. United States v. Cowles, 503 F.2d 67, 68 (2 Cir. 1974) cert. den. 419 U.S. 1113 (1975) establishes that a district judge need not ask conclusory questions or those involving issues of law or concerning the specific case. To the same effect is United States v. Wooten, 518 U.S. 943, 945 (3 Cir. 1975) [whether the prospective juror agreed with the law]; United States v. Owens, 415 F.2d 1308, 1315 (6 Cir. 1969) [prospective juror's understanding of international law]; Maguire v. United States, 358 F.2d 442 (10 Cir. 1966) cert. den. 397 U.S. 997 [question re homosexuality of person not the defendant]. In United States v. Staszcuk, 502 F.2d 875, 882 (7 Cir. 1974), the court specifically held it to be error, though not reversible error, for the trial judge to refuse upon request to make inquiry into a spouse's occupation. In United States v. Keen, 508 F.2d 986, 990 (9 Cir.

1974) cert. den. 421 U.S. 929 (1975), the Court restated the general rule that

> "A trial judge certainly should endeavor during voir dire to give both sides a maximum opportunity to assess the predispositions and reactions of prospective jurors."

In Pinkney v. United States, 380 F.2d 882, 887 (5 Cir. 1967) cited by the government, the refusal of the trial court to permit a show of hands concerning whether or not they were college graduates was affirmed, but only because

> "the educational background of each juror was available to appellant in returned questionnaires completed by all jurors and on file in the Office of the Clerk of the trial court."

(b)

On the issue of the unauthorized communication of the court with jurors (Govt. Br. pp. 81-34).

The court communicated on several different occasions privately with jurors during deliberations, over the objection of defense counsel. Disclosure of what transpired was not made, though requested, no hearing was held and at this writing defense counsel does not know what transpired. Said this Court recently in United States v. Brasco, 516 F.2d 816, 819 (2 Cir. 1975):

> "Where it appears . . . that an unauthorized private communication, contact or tampering, with a juror during trial did in fact relate to a matter pending before the jury, the communication is presumed prejudicial and a new trial must be granted unless the Government can establish at a hearing 'that such contact with the juror was harmless to the defendant.'"

See Remmer v. United States, 347 U.S. 227, 229 (1954).

III
ANSWERING POINT XVI
(Govt. Br. pp. 86-88)

The defendant Wesley was absent from the trial for a period of three days because he had been arrested and detained by federal authorities in Washington, D. C. (where he lived and had returned for the weekend). The defendant specifically did not waive his right to be present, under the circumstances his absence was involuntary and he was accordingly deprived of his constitutional right to be present at his trial.

No authority cited by the government supports its position that any waiver can be presumed where a defendant has been involuntarily incarcerated by the same federal authority that has brought him to trial and where he, himself, has not waived his right to be present.

CONCLUSION

The judgment of conviction of the defendant Wesley should be reversed.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for appellant
Rufus Wesley